Beverly Health and Rehabilitation Services, Inc. d/b/a Beverly Manor-San Francisco *and* Health Care Workers, Local 250, Service Employees International Union, AFL–CIO. Case 20–CA–27042

January 31, 1997

DECISION AND ORDER

BY MEMBERS BROWNING, FOX, AND HIGGINS

On September 20, 1996, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions, and to adopt the recommended Order as modified.[1]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Beverly Health and Rehabilitation Services, Inc., d/b/a Beverly Manor-San Francisco, San Francisco, California, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(d) and reletter the subsequent paragraphs.

"(d) Furnish the Union with a copy of any current personnel handbook and house rules issued to employees in the licensed vocational nurse bargaining unit."

2. Substitute the following for the relettered paragraph 2(e).

"(e) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the following paragraph 2(g) for the relettered paragraphs 2(g) and (h).

"(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible representative on a form provided by the Region attesting to the steps that the Respondent has taken to comply."

Amanda Alvarado Ford, Esq., for the General Counsel.
David S. Durham, Robert Leinwand, Esq. (Littler, Mendelson, Fastiff, Tichy & Mathiason), for the Respondent.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in San Francisco, California, on July 11, 1996. On January 8, 1996, Health Care Workers, Local 250, Service Employees International Union, AFL–CIO (the Union) filed a charge in Case 20–CA–27042 against Beverly Health and Rehabilitation Services, Inc., d/b/a Beverly Manor-San Francisco (Respondent or Beverly Manor). On March 6, 1996, the Union filed an amended charge. Complaint issued February 27, 1996, alleging Respondent violated Section 8(a)(1) and (5) of the National Labor Relations Act (the Act), by refusing to bargain with the Union regarding a unit of licensed vocational nurses (LVNs) and by refusing to furnish or unreasonably delaying furnishing the Union with requested information necessary for and relevant to the Union's performance of its duties as the exclusive representative of the LVNs.[1]

The parties have been afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. Upon the entire record and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a California corporation with its principal place of business in San Francisco, California, where it has been engaged in the operation of a convalescent hospital. During calendar year 1995, Respondent derived gross revenues in excess of $100,000 and purchased and received at its San Francisco facility goods valued in excess of $5000 directly from points outside the state of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

Respondent admits and I find that at all relevant times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[1] The judge found that the Respondent unlawfully failed to provide the Union with any employee handbook or house rules issued to the unit of nonsupervisory licensed vocational nurses. However, in her proposed Order, the judge inadvertently failed to require the Respondent to provide this requested information to the Union. We have modified the proposed Order to correct this omission.

We have also modified the recommended Order to comport more fully with our decision in *Indian Hills Care Center*, 321 NLRB 144 (1996).

[1] On June 21, 1996, Case 20–CA–27187 was consolidated with Case 20–CA–27042 and an amended complaint issued. On July 9, 1996, the cases were severed.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

The facts are largely undisputed. The Union has represented the following unit of employees (unit A) at Beverly Manor for approximately 36 years:

> Non-supervisory licensed vocational nurses, nurses aides, certified nurses aides, physical therapy aides, activity aides, restorative aides, housekeepers, laundry aides, kitchen aides, central supply aides, maintenance men, and cooks; excluding Administrator, Department Heads, registered nurses, supervisory licensed vocational nurses, office clerical employees, and guards and supervisors as defined in the Act.

This recognition has been embodied in successive contracts, the most recent of which was effective by its terms from September 2, 1994, through September 1, 1996. At the time the 1994–1996 contract was negotiated, there were licensed vocational nurses (LVNs) employed by Respondent, but the parties believed they were supervisory as defined by the Act and thus excluded from representation by the Union. The contract specifically utilizes the term "employee" when delineating terms and conditions of employment. Minimum hourly wages effective September 2, 1994, are set forth in appendix A to the contract for various classifications covered by the 1994–1996 contract but no wages are set forth for LVNs.

On August 3, 1995[2], the Union filed a representation petition in Case 20–RC–17124 seeking to represent a "unit" of LVNs (unit B) employed by Respondent. On the same day, the Union also filed a unit clarification petition, Case 20–UC–357.[3] By order of August 16, these cases were consolidated. The parties entered into a stipulated election agreement in Case 20–RC–17124 with attached *Norris Thermador*[4] list on August 24. Their stipulated election agreement was approved the following day.[5] Pursuant to a secret ballot election conducted September 20, the Union was certified on September 28 as the exclusive representative of the LVNs. At all times since September 28, the Union has been the exclusive representative of the LVNs pursuant to Section 9(a) of the Act.[6]

By letter of September 28, Daniel E. Martin, a union field representative, wrote to the administrator of Beverly Manor demanding to bargain over the disciplinary actions taken against an LVN and requesting certain information which the Union believed relevant to the matter.[7] On October 3, Julia Halladay, associate relations representative, responded stating that there was no need to bargain over the discipline of the LVN as all of the LVNs were, "now covered by the [contract] currently in effect between [Respondent and the Union]. This was effective August 20, 1995, when the results of the Unit Clarification election were certified by . . . the [NLRB]." Halladay asserted the LVNs must follow the grievance procedures in that contract.

On October 24, Martin wrote to Halladay stating, inter alia:

> This is to acknowledge your letter dated October 3, 1995 confirming that LVNs . . . are now covered by the current Collective Bargaining Agreement. We hereby enter into an understanding that the LVNs will maintain their current wages and benefits for the life of the current Collective Bargaining Agreement.
>
> Collective Bargaining for LVNs will then begin with the rest of the bargaining unit when the contract reopens for wages next spring.

In a letter dated November 7, Halladay thanked Martin for confirming that the LVNs were covered under the current contract, "through September 1, 1996, and agreements reached for this bargaining unit thereafter. "Halladay announced, "One of the consequences of the election results, and [contract] coverage, is that the pre- and post-election terms of employment for the LVNs are changed immediately." The changes were enumerated as follows:

> 1. Any LVN currently covered by the Beverly Medical Plan must re-enroll in the Kaiser HMO. The new coverage will be effective January 1, 1996. The Kaiser HMO rates . . . which apply to union members will be changed effective November 23, 1995. For the LVNs with dependents this will mean an increase in the payperiod amount deducted from their checks.
>
> 2. Overtime will be calculated on the basis of 8 hours/day and 40 hours/week rather than 8 hours/day and 80 hours/payperiod. This may mean that the Employer will no longer be able to accommodate the every other weekend off schedule which the LVNs enjoyed as non-union employees.
>
> 3. LVNs will no longer be eligible for the vision plan, CIGNA group universal life insurance, Colonial Life insurance plans, health care spending account, dependent care assistance account.

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[2] All events occurred in 1995 unless otherwise specified.

[3] The unit set forth in the unit clarification petition to describe the present bargaining unit was, "All service maintenance and technical employees employed by the Employer at its San Francisco facility." Exclusions listed to describe the present bargaining unit were, "Professional employees, Licensed Vocational Nurses, guards, and supervisors as defined in the Act." The unit sought after clarification was, "All full-time and regular part-time service maintenance and technical employees including Licensed Vocational Nurses employed by the Employer at its San Francisco facility." The exclusions from the unit sought after clarification were, "Professional employees, guards and supervisors as defined in the Act."

[4] In *Norris-Thermador Corp.*, 119 NLRB 1301 (1958), the Board adopted a policy that parties to a representation proceeding should be permitted to resolve, as between themselves, issues of eligibility prior to an election if they clearly indicate their intention to do so in writing.

[5] The stipulation set forth the following "appropriate collective-bargaining unit:" "All full time and regular part-time [LVNs] employed by [Respondent] at its San Francisco, CA facility, excluding all employees covered by collective bargaining agreements, registered nurses, guards and supervisors as defined by the Act."

[6] In stipulating to these facts, the parties resolved their disagreement regarding their use of the term "LVNs" by noting that the Respondent used this term in the stipulation to mean simply licensed vocational nurses while the Union and General Counsel used this term in the stipulation to refer to the unit of LVNs. This disagreement is at the core of these proceedings.

[7] Neither this information request nor the discipline of the LVN are involved in these proceedings.

> 4. Effective the payperiod beginning November 9, 1995, the LVNs will begin to accrue vacation based on their years of service. The accrued vacation will be added to any remaining 1994 vacation and may be taken after the LVNs reach their 1995 anniversary date.

Halladay concluded, "All other provisions of the [contract] separate from wages, will also immediately apply to the LVNs. Their current wage rates will be maintained until such time as wages are negotiated between the Parties."

By letter of November 17, Martin stated that his October 24 letter confirmed the Union's position that the LVNs would maintain their current benefits and wages for the life of the existing contract and that any change in the LVNs' benefits or working conditions was an unfair labor practice. The letter demanded that Respondent bargain over the terms and conditions of the LVNs' employment and requested that Respondent provide the Union with the following information:

1. Bargaining Unit Information

   a. Name/address/city/zip/home phone number
   b. Social security number
   c. Date of hire/job classification
   d. Base hourly rate of pay/shift differential and other premiums, listed separately for each worker
   e. Average hours compensated per day period for the preceding three months
   f. Category/employee status (i.e., full-time, part-time)
   g. Marital status

2. Benefit Information

   a. Premium costs per workers and per family for the current year and the previous year for each benefit.
   b. Number of bargaining unit employees participating in each level of coverage (single/family) for each type of benefit.
   c. A copy of the summary plan descriptions for each type of insurance provided.
   d. A copy of any addition fringe benefit information/documents provided to employees.
   e. Vacation accrual rates.

3. Facility—Specific Information

   a. A copy of current employee personnel handbook and house rules issued to the bargaining unit employees.
   b. A copy of current information provided to employees during their orientation.

On December 5, Halladay responded to the Union's letter of November 17 to, "clarify several of the inaccuracies from the Employer's perspective." Halladay stated Respondent had never agreed that the LVNs' benefits would remain the same during the life of the current contract and, accordingly, there was no mutual agreement on that point. She acknowledged that there was mutual agreement that current wages would remain in effect. Halladay further stated, "The changes that occurred with respect to benefits resulted from the outcome of the unit clarification election after which we mutually agreed that the LVNs were covered by the current [contract]. I confirmed our mutual agreement in my November 7th letter to you." Finally, Halladay declined to provide the requested information,

> since it was tied to the Union's misunderstanding of the reasons the [contract] controls the LVNs wages, hours and other terms and conditions of employment. The LVNs are now covered by the [contract] as a result of a unit clarification election which occurred on September 20, 1995. Thus, the result is one of law and not one of negotiations.

Appended to Halladay's December 5 letter was a copy of her November 7 letter with new effective dates for certain of the changes which had been announced therein.

A memorandum of agreement was signed by Respondent on November 21 and by the Union on December 18. It was appended to the contract and stated,

> There are currently no non-supervisory licensed vocational nurses employed in the facility. If the Employer employs any non-supervisory LVN's in the future, the Employer and the Union will meet to negotiate over wages, benefits, and other terms and conditions of employment.[8]

About November 27, Respondent changed the method by which the LVNs accrued vacation time and the method for calculating overtime pay of LVNs. About January 1, 1996, Respondent eliminated certain health care benefits and life insurance benefits of the LVNs, changed the rates for health care benefits of the LVNs, and changed the health care plan of LVNs. Respondent agrees that these subjects relate to wages, hours, and other terms and conditions of employment of the LVNs and are mandatory subjects for the purposes of collective bargaining.

During January and February 1996, due to a wage reopener in the existing contract, Respondent and the Union negotiated over wages of the unit A employees and the LVNs. Respondent also provided the Union with some of the requested information. The remainder of the information has now been provided except that Respondent has not furnished a copy of the current employee personnel handbook and house rules issued to the LVNs because it asserts there are no such documents.

Information regarding rates of pay for each employee was first furnished the Union in January 1996. Vacation accrual rate information was first furnished the Union on April 17, 1996. Average hours compensated per pay period, number of bargaining unit employees participating in each level of coverage (single/family) for each benefit, and information provided to employees during orientation was first furnished the Union on or about June 6, 1996. Respondent first furnished the category/employee status (i.e., full time, part-time) and marital status information on or about January 1996 and June 1996.

Respondent first provided premium costs per worker and per family for 1996 on or about June 6, 1996, and first furnished the information for 1995 on or about July 9, 1996. Respondent first furnished the Union with summary plan descriptions for one of three types of insurance plans offered by Respondent on or about June 6, 1996, and for another of

[8] No extrinsic evidence was adduced regarding this memorandum.

the three types of plans on or about July 9, 1996, and the third, at the hearing on July 11, 1996. Copies of any additional fringe benefit information/documents provided to employees was first furnished to the Union between May and June 1996. Shift differentials for each employee and premium costs per worker and per family for 1994 for each benefit was provided posthearing on July 19, 1996.[9]

At the back of the 1994–1996 contract are two documents entitled, "Appendix A." Both are wage rate schedules. The first appendix A sets forth wage rates effective September 2, 1994. It does not set forth wage rates for LVNs. The 1994–1996 contract provides for a wage reopener on March 1, 1996. The second appendix A, effective March 1, 1996, sets forth wage rates for various classifications including LVNs. The 1996 appendix A was executed by the parties on March 28, 1996. In a letter of February 1, 1996, the Union asserts that although Respondent has bargained about the wages of LVNs, there has been no bargaining regarding other terms and conditions of their employment.

B. *Analysis and conclusions*

1. Unilateral changes

As is readily apparent, both the bargaining unit set forth in the contract (unit A) and the bargaining unit certified in Case 20–RC–17124 (unit B) include a classification for LVNs. The unit A bargaining relationship has existed for 36 years and despite the current contract's recognition language including nonsupervisory LVNs, which has remained unchanged for 20 years, no terms or conditions of employment for LVNs were set forth because the parties thought all of the LVNs employed by Respondent were supervisory. Although the job duties of these LVNs did not change, in September, the parties agreed to an election among the LVNs and the Union was certified to represent them. In the absence of inclusion of LVNs in unit A by operation of law or automatic coverage by the terms of the 1994–1996 contract by operation of law, the question to be resolved is whether the Union's statement on October 24, "confirming that LVNs . . . are now covered by the current Collective Bargaining Agreement," constituted an agreement to include them in unit A under the terms of the 1994–1996 contract.

I find that the LVNs were not automatically included in unit A by operation of law or covered by the terms of the 1994–1996 contract by operation of law. Moreover, I find that there was no agreement to include the LVNs in unit A under the terms of the 1994–1996 contract. Respondent's correspondence indicates that it treated the election as a "clarification election" and treated the LVNs, once certified, as included in unit A and covered by the 1994–1996 contract. The Union's correspondence is ambiguous regarding contract coverage for LVNs. Under these circumstances, no agreement was reached regarding contract coverage for the LVNs.[10] Accordingly, before altering the terms and conditions of the LVNs' employment, the Respondent was obligated to give notice and an opportunity to bargain to the Union. I find that Respondent's announcement of its intent to alter the LVNs' terms and conditions of employment set forth a fait accompli. Moreover, the announced changes were not immediately implemented and before they were, the Union clearly indicated that the Respondent must bargain with it before implementation.

2. Inclusion of LVNs in unit A by operation of law

Respondent argues that the changes it made in LVNs' terms and conditions of employment simply reflected the inclusion of these employees under the terms of the 1994–1996 contract. Although Respondent agrees that the changes involved mandatory subjects of bargaining which would ordinarily result in a duty to bargain,[11] it argues that there was no duty to bargain with the Union under the circumstances of this case because the LVNs voted to accrete to the existing unit. Counsel for the General Counsel argues that the unit of LVNs is a new unit, separate and distinct from the contractual unit and that Respondent breached its duty to bargain when the Union requested to bargain over the terms and conditions of employment for the LVNs.

A self-determination election may be conducted when a union seeks to add a fringe group of previously unrepresented employees to its existing unit. *Warner-Lambert Co.*, 298 NLRB 993, 995 (1990). If a majority of the employees vote for representation, they are deemed to have indicated a desire to become part of the existing unit[12] while if a majority vote against representation, they are considered to indicate a desire to remain unrepresented. *Carr-Gottstein Foods Co.*, 307 NLRB 1318, 1319 (1992); *Mount Sinai Hospital*, 233 NLRB 507, 507–508 (1977); NLRB Casehandling Manual (Part II), Sec. 11090.1(c)(1).

It does not appear that the election held was a self-determination election. The stipulated election agreement sets forth a unit appropriate for collective bargaining rather than a voting group. Pursuant to the stipulated election agreement, the LVNs voted to be represented by the Union as a unit of, "all full-time and regular part-time licensed vocational

[9] Respondent's actions regarding the first three of the requested items in the letter of October 24 are not the subject of allegations herein.

[10] Having found that no agreement was reached regarding whether the LVNs were covered by the terms of the 1994–1996 contract, it is unnecessary to determine whether there was an agreement to include them in the unit A bargaining unit.

[11] Respondent admits in its answer that the methods for calculating overtime pay, elimination of certain health care benefits, life insurance benefits, method of accruing vacation, changing the rates of health care benefits, and changing the LVNs' health care plan are mandatory topics of bargaining in this case. In the Jt. Exh. 1, the parties agree that Respondent changed these terms and conditions of employment without bargaining with the Union.

[12] This procedure originated in *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937), and was expanded in *Armour and Co.*, 40 NLRB 1333 (1942); see generally, *NLRB v. Raytheon Co.*, 918 F.2d 249, 251–252 (1st Cir. 1990). Self-determination elections are generally not available if the unrepresented group has been excluded through historical accident. *Century Electric Co.*, 146 NLRB 232, 243–244 (1964); *D. V. Displays Corp.*, 134 NLRB 568, 571 (1962). Moreover, employees found to be an accretion to an existing unit are not granted a self-determination election but, rather, the existing unit is clarified to include them. *Locomotive Firemen & Enginemen*, 145 NLRB 1521, 1526 fn. 6 (1964); *Radio Corp. of America*, 141 NLRB 1134, 1137 (1963). Finally, an unrepresented group of employees who constitute an appropriate unit themselves are not eligible for self-determination purposes generally. *Ward Baking Co.*, 139 NLRB 1344, 1350 (1962). See, generally, An Outline of Law and Procedure in Representation Cases, Chapter 21-500 Self-Determination Elections (GPO 1992).

nurses . . . excluding all employees covered by collective-bargaining agreements." Had this been an election to "accrete" into the larger existing unit, as the Respondent argues, the appropriate collective-bargaining unit described in the stipulated election agreement would have specifically included the employees already covered by the 1994–1996 contract.[13] However, both the stipulated election agreement and the certification of representation clearly set forth a separate unit, distinct from the preexisting contractual unit, and specifically excluding, "all other employees covered by collective bargaining agreements." To the extent it might be relevant, there is no extrinsic evidence regarding preelection conversations between the Respondent and the Union as to their understanding of the purpose of the election. Accordingly, the evidence indicates that a representation petition with an ensuing certification of a unit of LVNs (unit B) occurred.

The unit clarification petition was consolidated with the representation petition. However, no different result occurs due to the consolidation. Generally, a unit clarification proceeding,

> is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall with the category—excluded or included —that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

Union Electric Co., 217 NLRB 666, 667 (1975). There is no evidence before me that the unit clarification petition was a part of the stipulated election agreement which bears case number 20–RC–20174 but does not include the case number of the clarification petition. Moreover, were unit clarification available in the circumstances herein, an administrative investigation or hearing would have determined the issue rather than an election.

Finally, I reject the Respondent's argument that the LVNs were accreted to the existing unit. Accretion is the addition of a group of employees to an already existing unit where the additional employees share an overwhelming community of interest with the existing unit employees and have no separate identity. The accretion doctrine is applied restrictively since it deprives employees of the opportunity to express their desires regarding membership in the existing unit. *Staten Island University Hospital v. NLRB*, 24 F.3d 450, 454–455 (2d. Cir. 1994); *Towne Ford Sales*, 270 NLRB 311 (1984), enfd., 759 F.2d 1477 (9th Cir. 1985). The LVNs do not constitute an accretion to unit A because they have a separate identity with a long history of exclusion from unit A.[14] Moreover, application of accretion to the LVNs would contravene the parties' stipulated election agreement.[15]

Respondent argues that the recognition clause in the preexisting contract should be treated as an accretion clause which required the LVNs to accrete to the larger unit once the Union and Respondent were aware of the LVNs' nonsupervisory status. Yet, when the election petition was filed, no party claimed the LVNs were supervisory, no party claimed they were covered by the recognition clause of the 1994–1996 contract, and no party claimed that the 1994–1996 contract was a bar to the petition. Rather, the parties treated the "non-supervisory licensed vocational nurses" phrase of the recognition clause as if it were superfluous. If Respondent believed the recognition clause mandated that the LVNs be included in the bargaining unit by operation of the accretion doctrine, Respondent should have made this argument before entering into a stipulated election agreement with the Union which allowed the LVNs to vote for representation in a separate unit. Thus, by entering into the election agreement, Respondent waived its argument regarding treatment of the recognition clause of the contract as an accretion clause.

Coverage of LVNs under the 1994–1996 contract by operation of law even if the representation election in Case 20–RC–17124 had been a self-determination election, the LVNs would not be automatically included under contract coverage by operation of law. Rather, when employees are added to a bargaining unit as a result of a self-determination election during the terms of a contract covering a larger unit, the newly added or "fringe group" employees are not automatically swept under the terms of the agreement covering the existing unit. *Wells Fargo Armored Service Corp.*, 300 NLRB 1104 (1990)(newly added employees not covered by existing contract); *Bay Medical Center*, 239 NLRB 731, 732 (1978)(employer violated Act in refusing to bargain regarding LPNs who voted in self-determination election to be included in existing unit); *Federal Mogul Corp.*, 209 NLRB 343, 344 (1974)(employer must bargain regarding appropriate contractual terms to be applied to new addition to previous unit); but cf., *NLRB v. Abex Corp.*, 543 F.2d 719, 721 (9th Cir. 1976)(declining to follow *Federal Mogul* in the circumstances of that case). The union and the employer must bargain over the terms and conditions under which the fringe group will work until the contract in the larger unit expires. *Federal Mogul*, 209 NLRB at 344.

In *Federal-Mogul*, maintenance employees, who had been specifically excluded from the contract, voted to be rep-

[13] See NLRB Casehandling Manual (Part Two) Sec. 11090.1c.1.

[14] See, e.g., *Aerojet-General Corp.*, 185 NLRB 794, 798 (1970); *United Hospitals*, 249 NLRB 562 (1980)(unrepresented admitting department employees did not constitute accretion to service and maintenance unit covered by contract because these employees were traditionally excluded from the unit); *NLRB v. Res-Care, Inc.*, 705 F.2d 1461 (7th Cir. 1983) (unit of 7 LPNs at nursing home held appropriate rather than merger with existing unit of nurses aides and maintenance employees because all other employees were in the existing unit and LPN unit was, in essence, an all technical unit).

[15] Respondent does not offer any newly discovered or previously unavailable evidence or allege that any special circumstances exist which would require reexamination of the representation proceeding.

resented by the incumbent union.[16] In determining that the maintenance employees were not swept under the existing contract, the Board relied upon *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970), in which the Court held that the Board was without authority to compel agreement to any substantive contractual provision of a contract. The Board interpreted the *H. K. Porter* doctrine to mean that it was without authority to force the parties to adopt contractual responsibilities which neither party had ever had the opportunity to negotiate.

Moreover, just as in *Federal-Mogul*, Respondent and the Union had negotiated the terms of the 1994–1996 contract while the LVNs were employed at Respondent's facility but no terms and conditions for LVNs were negotiated due to the belief that the LVNs were supervisors as defined by the Act. As stated in *Federal Mogul*, a party does not escape its obligation to bargain upon the theory that the newly added unit is automatically bound to terms of a contract which, when negotiated, had excluded them. Since the parties believed the LVNs were excluded from the contract, no "bargain" can be said to have been consciously made for them. Rather, during the first year of the contract, the LVNs had their own terms of employment which were separate and distinct from the terms set forth in the contract. There is no statutory authority to force on employees and their representative any contractual responsibility which neither party ever had the opportunity to negotiate. Since the LVNs' interests were not considered at the time the contract was negotiated, they are not bound by its terms.

3. Coverage of LVNs under the 1994–1996 contract by agreement of the parties

The existence or nonexistence of an agreement is a question of fact. *Metro Medical Group*, 307 NLRB 1184, 1191 (1992). Respondent claims the Union's October 24 letter constituted an agreement between the parties to include the LVNs under the terms of the contract. Specifically, that letter states, "This is to acknowledge your letter dated October 3, 1995 confirming that LVNs at Beverly Manor, San Francisco are now covered by the current Collective Bargaining Agreement." However, the next sentence of the letter states the Union's position that the wages and benefits of the LVNs would remain the same until the current contract expired: "We hereby enter into an understanding that the LVNs will maintain their current wages and benefits for the life of the current Collective Bargaining Agreement." Respondent's letter of November 7 clearly indicated Respondent understood the Union's position since Respondent stated it would only agree that the LVNs wages were to remain the same until negotiated. Respondent then announced the changes to benefits that would ensue due to its treatment of the LVNs as covered by the contract. These changes were announced as immediate.

However, the changes were not immediately implemented as announced. By letter of December 5, Respondent sought to, "clarify several of the inaccuracies" contained in the Union's November 17 letter which accused the Respondent of unilateral changes. New effective dates for implementation of the changes were appended to this letter. By this time, any confusion about the Union's position regarding the LVNs had been clarified in the Union's November 17 letter demanding to bargain over the terms and conditions of employment for LVNs and accusing the Respondent of unilateral changes by reducing benefits without bargaining and in retaliation for voting to be represented by the Union. Clearly, the language of this letter evidences no agreement to include the LVNs under the terms of the agreement.[17] Conversely, the Union did not clearly and unequivocally waive bargaining regarding a separate unit of LVNs.

Because I find no agreement to include the LVNs under the terms of the 1994–1996 contract nor any theory of law which would sweep the LVNs into unit A or the 1994–1996 contract terms, I find Respondent violated Section 8(a)(5) and (1) of the Act by unilaterally applying the terms and conditions of the 1994–1996 contract to the unit of LVNs without affording the Union an opportunity to bargain about these changes and the effects of these changes.

4. Unreasonable delay in furnishing and failure to furnish requested information

An employer must furnish relevant information in a reasonable time and without unreasonable delay to a union acting in its representative capacity. *Westmoreland Coal Co.*, 304 NLRB 528 (1991); *Valley Inventory Service*, 295 NLRB 1163, 1166 (1989). Accordingly, relevant information must be provided with reasonable diligence in order that the absence of the requested information not impede the bargaining or representation process.

Although Respondent's answer admitted the relevance of the requested information, the Respondent sought leave to amend its answer at the hearing to deny this allegation. I denied the request. Nevertheless, Martin testified extensively regarding the reasons that prompted his request for the information.

Specifically, Martin testified that he requested the rates of pay, shift differentials, and other premiums listed separately for each employee in order to create proposals to give to the employer for new wage rates and shirt differentials for LVNs for a new contract. He requested average hours compensated per pay period for the preceding 3 months in order to prepare compensation related proposals. This information would assist him in devising an intelligent proposal for bargaining. Category and employee status was requested in order to find out which employees were full time and which were part-time so that the Union could better "cost out" its proposals and understand the health benefits which would be relevant to the employees. Marital status was requested in order to create proposals related to benefits. Premium costs per worker and per family for the current year and the prior year and number of employees participating in each level of coverage. The number of bargaining unit employees participating in

[16] The preamble to the Notice of Election specifically stated that in voting yes, the employees were indicating a desire to be included in the existing unit currently represented by the union. 209 NLRB at 348.

[17] The memorandum of understanding executed by the parties in November and December is puzzling. However, its wording, "If the Employer employs any non-supervisory LVNs in the future, the Employer and the Union will meet to negotiate over wages, benefits, and other terms and conditions of employment," tends to reinforce my finding that no agreement was reached to include LVNs under the 1994–1996 contract terms.

each level of coverage (single/family) for each type of benefit was requested in order to assist the Union in creating proposals about health benefits and to provide information on past costs of these benefits so that the Union could assess its own proposals.

The summary plan descriptions for each type of insurance provided, copies of any additional fringe benefit information, vacation accrual rates, employee personnel handbook and house rules, and employee orientation information was requested in order to assess desirability of continuation of those plans or additional plans.

Respondent defends its failure to respond immediately based upon the, "parties agreement to accrete the LVNs to the existing bargaining unit." Asserting that the Union never narrowed or explained its request, given the "agreement to accrete," the Respondent asserts it was under no duty to provide the information at the time it was requested. Given my finding that the LVNs were not automatically included in unit A and that they were not swept into the terms of the 1994–1996 contract, there can be little doubt regarding the presumptive relevance of the requested information, all of it related to wages, hours, and terms and conditions of employment. See, e.g., *Consolidation Coal Co.*, 310 NLRB 6, 8 (1993).

Having found a duty to provide the information, I also find that the Respondent unreasonably delayed providing the information. During the midterm wage reopener, much of the requested information was provided. However, the information was provided between two and eight months following the request. As counsel for the General Counsel notes, a delay of 6 weeks in providing relevant information to the Union constituted a violation in *Bituminous Roadways of Colorado*, 314 NLRB 1010 (1994). Seven weeks was held an unreasonable delay in *Seiler Tank Truck Service*, 307 NLRB 1090 (1992). A 2-month delay was also found unreasonable in *Gloversville Embossing Corp.*, 314 NLRB 1258 (1994). Of course, all of the circumstances in these cases dictate the reasonableness of the delay. Here, the Union had to file unfair labor practice charges and negotiate a midterm reopener without much of the information it had requested. In these circumstances, I find an unreasonable delay occurred.

Respondent claims it did not unlawfully delay in furnishing or refusing to furnish an employee handbook or house rules since Respondent informed the Union on May 15, 1996, that these documents did not exist. No explanation is provided for the 6-month delay in responding to this request. Accordingly, whether or not any documents existed is beside the point. Moreover, Respondent's correspondence on this subject indicates that it did not utilize handbooks or house rules for bargaining unit employees, meaning to include LVNs in this group. Accordingly, it appears that these documents do exist but have not been provided.

I find that Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying providing the Union with certain requested information between 2 and 8 months. Further, I find that by failing to furnish certain information, the Respondent also violated Section 8(a)(1) and (5).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act.

2. The Union, a labor organization within the meaning of Section 2(5) of the Act, is the exclusive collective-bargaining representative pursuant to Section 9(a) of the Act of the following unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full time and regular part-time licensed vocational nurses employed at Respondent's San Francisco, California facility, excluding all employees covered by collective bargaining agreements, registered nurses, guards and supervisors as defined by the Act. (Unit B)

3. By changing the method by which it calculated the overtime pay of unit B employees, by eliminating certain health care benefits and life insurance benefits of unit B employees, by changing the method by which unit B employees accrue vacation, by changing the rates for health care benefits of unit B employees, and by changing the health care plan of unit B employees without affording the Union an opportunity to bargain about these changes or the effects of these changes, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act and Section 2(6) and (7) of the Act.

4. By its unreasonable delay in furnishing the Union with some information and failure to furnish other information necessary for and relevant to performance of its duties as the exclusive representative of unit employees, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) of the Act and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, it will be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) and (5) by failure to bargain with the Union about changing the method by which it calculated the overtime pay of unit B employees, by eliminating certain health care benefits and life insurance benefits of unit B employees, by changing the method by which unit B employees accrue vacation, by changing the rates for health care benefits of unit B employees, and by changing the health care plan of unit B employees, the Respondent shall be ordered to cease such unilateral changes, rescind all unilateral changes upon request, and make whole employees for any losses they have suffered because of the Respondent's unlawful unilateral changes, to be computed as set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), plus interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), except that any changes in wages, vacation accrual or benefits, or other terms and conditions of employment which were unilaterally instituted but are superior to those previously in place shall not be rescinded.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Beverly Health and Rehabilitation Services, Inc., d/b/a Beverly Manor-San Francisco, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Failing to bargain in good faith with the Union by changing the method by which it calculates the overtime pay of unit employees, by eliminating certain health care benefits and life insurance benefits of union employees, by changing the method by which unit employees accrue vacation, by changing the rates for health care benefits of unit employees, and by changing the health care plan of unit employees without affording the Union an opportunity to bargain with respect to these changes or the effects of these changes.

(b) Failing to bargain in good faith with the Union by failing to timely furnish the Union with certain information and failing to furnish other information necessary for and relevant to its performance of its duties as the exclusive representative of unit employees

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action.

(a) On request, bargain collectively with the Union as the exclusive bargaining representative of the following appropriate unit of employees and if agreement is reached, embody it in a new collective-bargaining agreement:

> All full time and regular part-time licensed vocational nurses employed at Respondent's San Francisco, California facility, excluding all employees covered by collective bargaining agreements, registered nurses, guards and supervisors as defined by the Act.

(b) On request, reinstate the terms and conditions of employment that existed before unilateral alteration of the method by which it calculated the overtime pay of unit B employees, elimination of certain health care benefits and life insurance benefits of unit B employees, alteration of the method by which unit B employees accrue vacation, alteration of the rates for health care benefits of unit B employees, and alteration of the health care plan of unit B employees.

(c) Make whole employees, with interest, for all unilateral changes as set forth in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Regional Director, post at its facility at 1477 Grove Street, San Francisco, California, copies of the attached notice marked "Appendix"[19] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by Respondent at any time since January 8, 1996.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

(g) Notify the Regional Director for Region 20, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[19] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
>
> To form, join, or assist any union
>
> To bargain collectively through representatives of their own choice
>
> To act together for other mutual aid or protection
>
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT fail and refuse to recognize and bargain with Health Care Workers, Local 250, Service Employees International Union, AFL–CIO, as the exclusive representative of our employees in the following appropriate unit:

> All full time and regular part-time licensed vocational nurses employed at Respondent's San Francisco, California facility, excluding all employees covered by collective bargaining agreements, registered nurses, guards and supervisors as defined by the Act.

WE WILL NOT unilaterally change the method by which we calculate your overtime pay, eliminate certain of your health care and life insurance benefits, change the method by which you accrue vacation, change your rates for health care benefits, or change your health care plan.

WE WILL NOT fail to timely furnish the Union with information necessary for and relevant to performance of its duties as the exclusive representative of unit employees

WE WILL, on request, bargain in good faith with Local 250 as the exclusive collective-bargaining representative of employees in the appropriate unit and if agreement is reached, embody the agreement in a new collective-bargaining agreement.

WE WILL rescind any changes in terms and conditions of employment which were made without notification to or bargaining with the Union except that any changes which were unilaterally instituted but are superior to prior terms shall not be rescinded.

WE WILL make whole unit employees for any losses they may have suffered by our failure and refusal to bargain with the Union before instituting changes in wages, hours, and terms and conditions of employment.

WE WILL timely furnish the Union with information necessary for and relevant to its performance of its duties as the exclusive representative of unit employees.

BEVERLY HEALTH AND REHABILITATION SERVICES, INC., D/B/A BEVERLY MANOR-SAN FRANCISCO